Brookville Health Care Center *and* District 1199J, National Union of Hospital and Health Care Employees, AFSCME, AFL–CIO. Case 22–CA–23007

August 1, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND COWEN

On March 2, 2000, Administrative Law Judge D. Barry Morris issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a reply to the Respondent's exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified below and to adopt the recommended Order.[2]

The judge concluded that the Respondent, a successor employer who purchased Brookville Health Care Center in November of 1997, violated Section 8(a)(1) and (5) of the Act by refusing to execute the predecessor employer's contract, which the Respondent had adopted by its conduct. The judge did not, however, expressly apply the clear and convincing evidence standard that the Board has repeatedly held appropriate in adoption by conduct cases. See, e.g., *Resco Products*, 331 NLRB 162, 165 (2000); *Field Bridge Associates*, 306 NLRB 322, 323 (1992), enfd. 982 F.2d 845 (2d Cir. 1993); *EG & G Florida, Inc.*, 279 NLRB 444, 453 (1986); *All State Factors*, 205 NLRB 1122, 1127 (1973). Because we nevertheless find the evidence sufficient to meet this standard, we adopt the judge's conclusion.[3]

The Respondent purchased Brookville on November 26, 1997. According to the facts stipulated by the parties, the Respondent continued to operate the business in basically unchanged form and employed, as a majority of its employees, individuals who were previously employed by its predecessor. Neither party disputes that the Respondent was a "successor" employer under *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972).

Just prior to the sale and after negotiation, the Union and the Respondent's predecessor entered into a memorandum of agreement extending the coverage of their most current collective-bargaining agreement effective November 1, 1997, through October 31, 2001 with certain modifications, including a schedule of wage increases, new holidays, additional sick time and vacation time, and a yearly uniform allowance.[4] From the date of its November 26, 1997 purchase of Brookville, the Respondent implemented all of the terms of the collective-bargaining agreement and the memorandum of agreement, but did not pay the 1997 uniform allowance.

In March or April 1998, Union Administrative Organizer Katherine Russell offered to send the Respondent's attorney, David Lew, copies of the new collective-bargaining agreement, incorporating the memorandum of agreement, and Lew told her to do so. In May 1998, Russell filed a class action grievance regarding the Respondent's failure to pay the 1997 uniform allowance. In June 1998, Russell contacted Lew to inquire whether he had signed the contract, and, upon learning that he had misplaced it, sent additional copies to him. The Respondent did not respond to Russell's attempts to discuss the grievance until June 1999, when it stated that it would

[1] The Respondent also filed a letter on May 12, 2000, supplementing its exceptions and brief in support of exceptions to the decision of the administrative law judge with a May 4, 2000 order of the Superior Court of New Jersey vacating the uniform allowance arbitration award against the Respondent. The General Counsel filed a motion to strike the Respondent's submission of May 12, 2000. Treating the Respondent's submission as a motion to reopen the record in order to introduce previously unavailable evidence, we nevertheless deny the motion and grant the General Counsel's motion to strike. The Respondent has not asserted that this evidence would require a different result in this case, and we conclude that it would not. Board's Rules and Regulations 102.48 (d)(1).

[2] We shall modify the judge's recommended order in accordance with our decision in *Ferguson Electric Co.*, 335 NLRB No. 15 (2001). Further, we shall substitute a new notice in accordance with our recent decision in *Ishikawa Gasket American, Inc.*, 337 NLRB No. 29 (2001).

[3] In addition, the judge did not address the Respondent's argument, made in its post-trial brief and reiterated in its brief in support of exceptions, that the Union's failure-to-execute claim is barred by the 6-month statute of limitations imposed by Sec. 10(b) of the Act. We find that the Respondent's failure to execute the contract occurred when the Respondent, having demonstrated its assumption of the obligations imposed by the contract as described infra, received the copies sent by the Union and did not sign them. See *Tasman Sea, Inc.*, 247 NLRB 18, 22 (1980) (finding that the employer's obligation to execute a contract obtained "[u]pon receiving the requested documents"). Russell testified that she sent out new copies of the contract on June 25, 1998, and learned that Lew had received them on August 4. The Union's filing of a charge with the Board on November 4 was therefore well within the 6-month limitations period.

[4] For example, the new raise schedule adopted in the memorandum of agreement required a wage increase of 3 percent in the first 2 years of the contract and a wage increase of 2-1/2 percent in the third year. Similarly, the new sick day schedule established an accrual of 3 days during the first year of the contract and 2 additional days in each of the 2 subsequent years.

not sign the contract unless the Union dropped the grievance. The Respondent did not appear at an August 5, 1999 arbitration hearing involving the grievance.

The Board has held that a successor employer's adoption of a predecessor's contract with a union may be inferred from conduct; however, that inference must be based on clear and convincing evidence. See, e.g., *Eklund's Sweden House Inn*, 203 NLRB 413 (1973) (although successor initially had disavowed the predecessor's collective-bargaining agreement in its contract for sale with the predecessor, the evidence that it subsequently adopted the agreement was "clear and convincing" where the successor consulted the agreement to ensure that a raise was contractually permissible, checked off dues, and treated the agreement as a starting point for negotiations); cf. *Resco Product*, supra (successor's agreement with predecessor that successor was responsible to pay certain benefits required by the predecessor's collective-bargaining agreement not "clear and convincing" evidence of adoption where successor's agreement was not "with the Union").

In concluding that that standard is met here, we rely on the following facts: (1) the Respondent's failure to expressly reject the contract or any of its terms; (2) the Respondent's compliance with all of the contract terms, including contractually required mid-term changes, and the union-security and dues-checkoff provisions; and (3) the Respondent's participation in several arbitration proceedings without asserting as a defense the absence of a binding contract between the parties.

First, the Respondent hired the predecessor's employees and immediately implemented the predecessor's agreement without expressly rejecting the contract or any of its terms. The Respondent's assertion that its failure to implement the uniform allowance provision itself indicates that it rejected the contract is unavailing. The uniform allowance was an annual, one-time payment, and the contract did not specify when it should be paid. It thus cannot be said that on November 26, 1997—when the Respondent bought the business and implemented the terms of the predecessor's agreement without immediately paying the 1997 allowance—it was failing to comply with, let alone objecting to, the uniform allowance provision.[5] Moreover, according to Russell's uncontradicted testimony, the Respondent stated its willingness to pay the 1998 allowance. At no time did the Respondent condition signing the contract on elimination of the uniform allowance provision or any other term. In other words, the Respondent here "failed to deny the applicability of the master agreement when it had an opportunity to do so." *U.S. Can Co.*, 305 NLRB 1127, 1136–1137 (1992), enfd. 984 F.2d 864 (7th Cir. 1993) (affirming judge's conclusion that a successor who had hired predecessor's employees, failed to unambiguously reject the predecessor contract at the outset, and implemented many of the contract provisions, including the union-security and dues checkoff clauses, had adopted the contract by its conduct).

Further, in spite of the Respondent's assertion to the contrary, there is no evidence that the Respondent at any time sought to contact Russell regarding the contract. Rather, Russell testified that she attempted to contact Lew several times after sending new copies of the contract to him on June 25, 1998, but that he "just didn't respond like he should." When Russell, after a several-week absence from work due to injury, finally did reach Lew on August 4, he indicated that he had received the new copies of the contract but had not read it. Russell further testified that when she reached Lew again on August 26, he indicated that he was too busy to discuss the contract and would speak with her on August 31. When Russell finally reached Lew on that day, he again stated that he was too busy to discuss the contract and would do so the next day. Russell was unable to reach Lew the next day, and he never returned her messages. In short, Russell's unrebutted testimony demonstrates that Respondent simply avoided the Union's repeated requests that it sign the predecessor's agreement and made no effort to negotiate over the uniform allowance or any other aspect of the contract.

Second, Russell's unrebutted testimony is that the Respondent complied with all terms of the contract, which included a union-security and dues-checkoff provision. Because these last provisions are entirely creatures of a binding contract between the employer and a Union, the Board has found a successor employer's continued implementation of such provisions a basis for inferring an employer's adoption of the predecessor's contract by its conduct. See id. at 1136–1137; *Eklund's Sweden House Inn*, supra at 418. In addition, Russell's testimony indicates that the Respondent not only maintained working conditions as they were when it took over Brookville, but actually implemented the new raise schedule and the new vacation and sick day accrual schedules laid out in the memorandum of agreement.

Finally, the Respondent participated in two grievance arbitration proceedings, one of which concerned the 1997 uniform allowance. The Board has found that a succes-

[5] Even assuming that the payment became due on the contract's effective date of November 1, 1997, the responsibility for paying it arguably lay with the predecessor, who signed the contract on November 20 and retained control of Brookville until November 26. Thus, in finding the adoption by conduct here, we do not decide whether the Respondent was obligated to pay the 1997 uniform allowance at all.

sor employer's adherence to the grievance process outlined in a predecessor's agreement supports the inference that the employer has adopted the predecessor's contract. See *Stockton Door Co.*, 218 NLRB 1053, 1054 (1975) (holding that successor employer had adopted the predecessor's collective-bargaining agreement by paying the same wages, contributing to the trust fund maintained for employees by the Union under the contract, and following the contract's grievance procedures); see also *U.S. Can Co.*, supra at 1132–1133. Although the Respondent did not actually appear at the uniform allowance arbitration hearing held on August 5, 1999, it explained its absence by asserting that its counsel and several witnesses would be unavailable on the scheduled date.[6] In its written submission to the arbitrator, the Respondent simply argued that it should not be held responsible for the 1997 allowance because it had not taken over Brookville until November 26 of that year. In short, the Respondent at no time claimed that it was not contractually bound to arbitrate disputes or raised the absence of a binding contract between the parties as a defense or explanation for its absence from the arbitration proceeding.

Based on these facts, we conclude that the evidence of the Respondent's adoption of its predecessor's contract is clear and convincing. Certainly, a successor employer has the freedom to reject the predecessor's contract. See *NLRB v. Burns International Security Services*, supra at 294–295. But if it exercises that right, it is obligated to bargain with the union over a new agreement. Id. Here, the Respondent did nothing to indicate that it was exercising that right and, as detailed, its conduct was completely inconsistent with doing so. Under all the circumstances, then, the Respondent was obligated to execute the predecessor's contract as proffered by the Union.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Brookville Health Care Center, Inc., Irvington, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order, as modified.

1. Substitute the following for paragraph 2(c).

"(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records, and all other records, if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington D.C., August 1, 2002

_____
Peter J. Hurtgen, Chairman

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Wilma B. Liebman, Member

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William B. Cowen, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively, in good faith, with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

WE WILL, upon request, execute forthwith and honor the collective-bargaining agreement between us and the Union effective November 1, 1997 to October 31, 2001.

WE WILL make our employees whole, with interest, for any loss of earnings or benefits they may have suffered by reason of our failure to execute the aforesaid agreement.

BROOKVILLE HEALTH CARE CENTER

[6] According to Russell's unrebutted testimony, the Respondent did appear at the earlier December 1998 arbitration hearing concerning a Brookville employee, Terrence Wilson.

Bert Dice-Goldberg, Esq., for the General Counsel.
Jeffrey Daitz, Esq. (Peckar & Abramson), of River Edge, New Jersey, for the Respondent.
Brian Kronick, Esq. (Balk, Oxfeld, Mandell & Cohen), of Newark, New Jersey, for the Charging Party.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in Newark, New Jersey, on October 6, 1999. Upon a charge filed on November 4, 1998, a complaint was issued on April 30, 1999, alleging that Brookville Health Care Center (Respondent), violated Section 8(a)(1) and (5) of the National Labor Relations Act (Act). Respondent filed an answer denying the commission of the alleged unfair labor practice.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by each of the parties.

Upon the entire record of the case, including my observation of the demeanor of the one witness who testified, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with an office and place of business in Irvington, New Jersey, has been engaged in the operation of a nursing home. Respondent has admitted, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been admitted, and I find, that District 1199J, National Union of Hospital and Health Care Employees, AFSCME, AFL–CIO (Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. The Facts

Respondent operates a nursing home in Irvington, New Jersey, which it purchased on November 26, 1997. The most recent collective-bargaining agreement between the Union and the predecessor employer was effective from December 1, 1993 to November 30, 1995. After negotiations, on November 20, 1997, the Union and the predecessor employer entered into a memorandum of agreement for a successor collective-bargaining agreement that was to be effective November 1, 1997 to October 31, 2001. The memorandum of agreement provided for a yearly allowance for uniforms effective November 1, 1997. Before the full agreement was reduced to writing Respondent purchased the Irvington facility.

Katherine Russell, the Union's administrative organizer, was the only witness to testify in this proceeding. She appeared to me to be a credible witness and I credit her testimony, which was unrebutted. On February 11, 1998[1] she had a telephone conversation with David Lew, Esq., counsel to Respondent. She asked him "about the signing of the contract." He asked her to send him copies of the memorandum of agreement and the prior collective-bargaining agreement. Russell sent Lew the requested copies on February 18.[2]

In March or April Lew was at the union office to negotiate a contract with a facility not involved in this proceeding. Russell met him there and asked him "about the printing of the new contract, if I could print it up." Russell credibly testified that Lew told her "go ahead and print up the new contract."

In June, Russell had another telephone conversation with Lew. Russell asked Lew about "signing" the contract. Lew responded that he had misplaced the copies and asked Russell to send additional copies. By letter dated June 25, Russell sent Lew the additional copies. The letter stated, "Once you have completed your review and if there are no changes, please have your client sign" the collective-bargaining agreement. On August 4, Russell spoke to Lew by telephone, at which time Lew confirmed that he had received the documents.

Russell credibly testified that Respondent implemented the raise, which was due November 1, 1997, new holidays, additional sick time and vacations. I credit her testimony that everything in the memorandum of agreement was implemented except for the uniform allowance. Russell also testified that Respondent indicated that its only problem with the proposed collective-bargaining agreement was the uniform allowance and that it was Respondent's contention that it should not be responsible for the payment of the 1997 allowance. I credit her testimony that she was first aware of the issue concerning the uniform allowance in May 1998.

B. Discussion and Conclusions

1. March conversation

During March, when Lew was at the union office on another matter, Russell and Lew had a conversation. Russell asked Lew about "printing" the new collective-bargaining agreement. Lew responded, "Go ahead and print up the new contract." General Counsel contends that Lew's response indicated that he agreed to the terms of the contract.

I believe that Lew's comment was ambiguous. It could mean, as General Counsel argues, that Lew agreed to the terms of the contract. On the other hand, it could mean that Lew was requesting that Russell have the agreement printed so that he could then review it. In *U.S. Can Co.*, 305 NLRB 1127 (1992), enfd. 984 F.2d 864 (7th Cir. 1993), the Board noted that a statement by the respondent in that case was "ambiguous and susceptible to several interpretations." The Board stated (id.):

[1] All dates refer to 1998 unless otherwise specified.

[2] Respondent objected to the receipt into evidence of Russell's February 18 letter enclosing the documents on the ground that it was sent by the Union's clerical personnel rather than by Russell herself. Russell credibly testified that she instructed her secretaries to mail the letter and the documents and that the material was not returned as "undelivered." The letter was admitted into evidence. As the Board stated in *Art Berger*, 321 NLRB 815 fn. 2 (1996) "the failure of the Postal Service to return documents served by regular mail indicates actual receipt of those documents by the Respondent." In any event, the complaint alleges that Respondent's refusal to execute the collective-bargaining agreement took place on or about June 25. Lew confirmed that he received the documents that were sent on June 25.

> The Respondent may have intended by this sentence to inform the Union that it would maintain existing terms and conditions of employment that it was required under *Burns* to maintain until a new agreement or impasse was reached. But the sentence is equally susceptible to an interpretation that the Respondent was expressly adopting its predecessor's contract in toto. Given this ambiguity from the very outset of the Respondent's communications with the Union, an examination of the Respondent's subsequent conduct becomes necessary.

2. Adherence to the terms of the contract

As noted above, where Respondent's intention is ambiguous, it is necessary to look to Respondent's "subsequent conduct" to determine whether it has in fact agreed to be bound by the terms of the contract. I have credited Russell's testimony that Respondent implemented the raise that was due on November 1, 1997, and implemented the provisions respecting new holidays, additional sick time, and vacations. I have also credited her testimony that everything in the memorandum of agreement was implemented except for the uniform allowance. Indeed, the memorandum of agreement states that "All terms and conditions of the prior agreement not changed, as per above, shall remain the same." Article II of the prior agreement contained a union-security clause and article III contained dues-check-off provisions. Thus, since I have credited Russell's testimony, which was unrebutted, that everything in the prior agreement was implemented, except for the uniform allowance, Respondent also implemented the union-security and dues-checkoff provisions. In this regard, the Board's holding in *U.S. Can Co.*, supra, is noteworthy. The Board stated (305 NLRB at 1127):

> We agree with the judge . . . that the Respondent by its conduct adopted and became bound to its predecessor's contract. In this regard, we note particularly that the Respondent honored the union-security and checkoff provisions of the predecessor's contract. These are matters which are dependent on the existence of a current contract.

Respondent implemented all of the terms of the memorandum of agreement, except for the uniform allowance. It implemented the raise which was due on November 1, 1997, and it implemented the provisions concerning new holidays, additional sick time, and vacations. It continued to adhere to the union-security and dues-checkoff provisions. Pursuant to *U.S. Can Co.*, supra, I find, that by so doing, it demonstrated that it agreed to the terms of the new collective-bargaining agreement. Its failure to execute the agreement constitutes a violation of Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full- and part-time licensed practical nurses, cooks, certified nurses' aides, maintenance employees, recreation employees, dietary aides, and housekeeping employees employed at Respondent's Irvington, New Jersey facility, excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

4. By failing and refusing to execute the collective-bargaining agreement on June 25, 1998, Respondent has violated Section 8(a)(1) and (5) of the Act.

5. The unfair labor practice of Respondent affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in an unfair labor practice, in violation of the Act, I shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. I shall order Respondent to execute and honor the collective-bargaining agreement effective November 1, 1997 to October 31, 2001, and to make whole Respondent's employees for any loss of earnings and benefits they may have suffered by reason of Respondent's failure to execute the agreement. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682, 683 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest to be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Brookville Health Care Center, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively, in good faith, with the Union, as the exclusive collective-bargaining representative of the employees in the appropriate unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request, execute forthwith and honor the collective-bargaining agreement between Respondent and the Union effective November 1, 1997 to October 31, 2001.

(b) Make its employees whole, with interest, for any loss of earnings and benefits they may have suffered by reason of Respondent's failure to execute the aforesaid agreement, in the manner set forth in the remedy section of the decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of any sums due under the terms of this Order.

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[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Within 14 days after service by the Region, post at its facility in Irvington, New Jersey, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 25, 1998.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., March 2, 2000

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively, in good faith, with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

WE WILL, upon request, execute forthwith and honor the collective-bargaining agreement between us and the Union effective November 1, 1997 to October 31, 2001.

WE WILL make our employees whole, with interest, for any loss of earnings or benefits they may have suffered by reason of our failure to execute the aforesaid agreement.

BROOKVILLE HEALTH CARE CENTER